

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

MODESTO HOSPITALITY, LLC, d/b/a
DOUBLETREE HOTEL MODESTO

Employer¹

and

Case 32-RC-5546

TEAMSTERS LOCAL 948, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Petitioner

REGIONAL DIRECTOR'S DECISION
AND DIRECTION OF ELECTION

The Employer operates a full-service hotel in Modesto, California. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent an overall unit of the Employer's nonsupervisory employees. A hearing officer of the Board held a hearing and the parties have filed post-hearing briefs.

As evidenced at the hearing and in their briefs, the parties agree on the unit description in the amended petition but disagree on whether the three housekeeping supervisors and the front office supervisor are supervisors within the meaning of Section 2(11) of the Act.² I have carefully considered the evidence and arguments presented by both parties on these issues. As discussed below, I conclude that the housekeeping supervisors are not statutory

¹ The Employer's name appears as amended at the hearing.

² The Petitioner amended its petition at the hearing to seek the following classifications: All full-time and regular part-time housekeeping employees, laundry employees, maintenance employees, customer service employees, front desk employees, gift shop employees, janitorial employees, food and beverage employees, valet employees, office staff employees, housekeeping supervisors, purchasing manager, front office supervisor, accounts payable employees, accounts receivable employees, catering administrative assistants, kitchen supervisors, and night auditors, employed by the Employer at its Modesto, facility, EXCLUDING sous chefs, lead banquet captain, banquet captains, bell captain, income auditor, sales and catering managers, executive administrator, guards, and supervisors as defined in the Act. The Employer stipulated to the appropriateness of the excluded classifications.

supervisors, and I shall include them in the unit found appropriate herein.³ However, I conclude that the front office supervisor is as statutory supervisor and is, therefore, properly excluded from the unit. There are approximately 181 employees in the unit sought by Petitioner, 177 employees in the unit sought by the Employer, and 180 employees in the unit found appropriate here.

OVERVIEW OF EMPLOYER'S OPERATIONS

The Employer's hotel provides 285 rooms for lodging and offers amenities including food, beverage, catering, and banquet services from an on-site lounge and restaurant. The Employer is the only full-service hotel in Stanislaus County and it employs approximately 210 employees, all of whom are referred to as team members, including the managers and supervisors whom Petitioner does not seek to represent and whose exclusion is not disputed by the Employer.⁴

The Employer's operations are divided into seven divisions with heads referred to as directors or managers who report to the Employer's general manager.⁵ The disputed classifications are in the "room operations" division, which includes the gift shop, housekeeping, front office (also referred to as front desk), valet, and bell services, and is under the overall supervision of the director of room operations. The housekeeping supervisors report to the

³ In light of this conclusion, I find that the showing of interest in support of the petition is adequate and I hereby deny the Employer's request on January 18, 2008, to dismiss the petition.

⁴ In accordance with the evidence adduced at hearing and the parties' stipulation, I find that the following classifications are properly excluded from the unit as managerial employees: general manager; director of finance; director of revenue management; director of sales; director of room operations; director of property operations; director of food and beverage; manager of human resources; night manager; director of housekeeping; property operations supervisor; banquet manager; restaurant manager; executive chef; and sales and catering managers.

⁵ The seven divisions are as follows: finance; revenue management; sales; room operations; property operations; food and beverage; and human resources.

director of housekeeping, who reports to the director of room operations. The front office supervisor reports directly to the director of room operations or to the night manager.⁶

Housekeeping Operation

There are approximately 41 team members employed in the Employer's housekeeping operation, including the director of housekeeping, 3 housekeeping supervisors; 4 house attendants, 2 janitors, 6 laundry employees, 4 lobby attendants, and 21 room attendants. As discussed in greater detail below, the housekeeping supervisors are primarily responsible for inspecting the Employer's hotel rooms, suites, and public areas to ensure that these areas are cleaned in accordance with the Employer's established standards. One housekeeping supervisor testified that he spends approximately 80 to 90 percent of his time inspecting the guest rooms, which are cleaned by the room attendants. The room attendants are not present during the inspection, thus, the housekeeping supervisor normally corrects any deficiencies upon discovery during the inspection. House attendants maintain the housekeeping department supplies and they provide room attendants with the supplies necessary to clean and restock the room, including the linens and towels laundered by laundry employees. Lobby attendants maintain the Employer's lobby area and clean guest rooms which are routinely occupied by airline flight crews, and janitors handle maintenance issues throughout the hotel.

The director of housekeeping prepares a weekly housekeeping schedule for the housekeeping team members which is submitted to the director of room operations and the director of finance for approval. The Employer's general manager also testified that he reviews the housekeeping schedule. The schedule is prepared approximately 10 to 14 days in advance and the number of housekeeping employees scheduled for a particular day is largely determined by the projected occupancy rate—the estimated number of occupied rooms based upon existing reservations and anticipated bookings. The forecasted occupancy rates are

⁶ The front office supervisor is also referred to in the record as the senior front office supervisor, even though there are no other front officer supervisors.

provided to the director of housekeeping by the Employer's revenue management personnel. This information includes the number of room attendants necessary for a particular day based upon a ratio of 1 room attendant per every 15 occupied rooms, as the Employer's productivity policy requires room attendants to clean 15 rooms per eight-hour shift. For scheduling purposes, the ratio applies even though some of the rooms may not ultimately require cleaning if guests decline housekeeping services. The director of housekeeping normally schedules the number of room attendants specified by the forecast. However, relying on her industry experience and her experience at the Employer's facility, the director of housekeeping testified that she does not always schedule the number of room attendants specified by the forecast.

The room attendants are assigned to eight-hour day shifts beginning at 8:30 a.m. or 9:30 a.m. With respect to other members of the housekeeping operation, there are normally two house attendants per day, both of whom are assigned to the day shift, and two lobby attendants per day, one per shift.⁷ However, at least once or twice a week, the director of housekeeping schedules two lobby attendants on the night shift, with the expectation that one of the lobby attendants can clean guest rooms if necessary.⁸ There are normally 3 to 5 laundry employees scheduled to work eight-hour shifts, with varying starting times typically between 5 a.m. and 2 p.m. One janitor is assigned to work the night shift each evening from 10:30 p.m. until 6:30 a.m.; sometimes two janitors are scheduled on Saturdays. The record reflects some scheduled interchange among housekeeping classifications, most frequently by the janitorial employee who is sometimes assigned a shift in laundry.

As part of the Employer's productivity policy, the facility has one presidential suite which is counted as three rooms, and several palace suites which are counted as two rooms. The guest rooms and suites are located on nine floors which are divided into "A" and "B" sections for

⁷ The house attendants work eight-hour shifts beginning at 9:00 a.m. and 10:00 a.m. Lobby attendants on the day shift work from 7:00 a.m. until 3:30 p.m.; night shift lobby attendants work from 2:00 p.m. until 10:30 p.m.

⁸ The additional night lobby attendant normally works from 4:00 p.m. until 12:30 a.m.

assignment purposes. While there is no significant difference in the rooms or suites located in a particular section, the room attendants, other than those designated as “floaters,” are regularly assigned to work in their preferred section. A list of the room attendants’ preferred section assignments is posted in the housekeeping office. Section assignments do not appear on the weekly schedule as it is not possible to determine the location of the rooms requiring cleaning in advance of the daily opening report, which identifies which rooms are occupied. Thus, section assignments are given to the room attendants in accordance with their stated preference at the beginning of their shift. The section assignments are normally given to the room attendants by the director of housekeeping who works five days a week, Tuesday through Saturday, from 7:30 a.m. until 5:30 p.m.⁹ A housekeeping supervisor runs the daily opening report and provides room attendants with section assignments when the director of housekeeping is not working or is otherwise unavailable.¹⁰

Front Office/Desk Operation

Team members assigned to the Employer’s front office operation are classified as guest service agents and “PBX” operators. There are approximately nine front office team members, including the front office supervisor, four guest service agents, and four PBX operators.¹¹ The front office supervisor and the guest service agents are primarily responsible for processing guest arrivals and departures, handling billing issues, and addressing any guest concerns. PBX

⁹ There are other manager(s) and/or supervisor(s) at the hotel when the director of housekeeping is not working.

¹⁰ Two housekeeping supervisors work eight-hour day shifts, with varying starting times between 7:30 a.m. and 10 a.m., five days a week, and different days off. The night shift housekeeping supervisor works eight-hour shifts with varying starting times between 12 p.m. and 4 p.m., five days a week.

¹¹ These numbers are based upon schedules introduced at hearing. The record is unclear how many employees are employed in each classification. The front office supervisor testified that there were not any employees currently designated as PBX operators. However, there were four employees assigned as PBX operators on a recent schedule, and the Employer’s master employee list identifies two of these employees as telephone operators.

operators answer incoming calls, exclusive of reservations, and connect the callers to the correct department.¹²

The front desk supervisor prepares the weekly schedule for the front office team members after reviewing the projected occupancy levels, group reservations, and predicted arrivals and departures. She testified that she normally schedules two guest service agents for the day shift, from 7:00 am until 3:00 p.m., and two per night shift from 3:00 p.m. until 11:30 p.m. However, she may schedule an additional guest service agent on either shift, as she deems necessary based upon the forecasted information received from the Employer's revenue management personnel, and she has the discretion to schedule an additional mid-shift, from 1:00 p.m. to 9:30 p.m.

The front office supervisor works five days a week from 7:00 a.m. until 3:30 p.m., with rotating days off, and performs the duties of the guest service agent when she is scheduled. Thus, according to the front office supervisor, she includes herself as one of the two guest service agents she typically schedules each shift. She also testified that she normally schedules one PBX operator per shift; the day shift is 7:00 a.m. until 3:30 p.m. and the night shift is 2:00 pm. until 10:30 p.m. However, three weekly schedules were introduced at hearing which reflect regular departures from this practice.¹³

II. ANALYSIS OF SECTION 2(11) STATUS

The traditional test for determining supervisory status is: (1) whether the employee has the authority to engage in, or effectively recommend, any of the 12 criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment;

¹² The record established that room reservations are handled by other employees who are not part of the front office operation and who do not report to the front office supervisor.

¹³ On one weekly schedule, there were no PBX operators scheduled for the night shift on four days, and, on one of the nights when a PBX operator was scheduled, the shift started at 12:00 p.m. rather than 2:00 p.m. Additionally, on this same schedule, there were two days with two PBX operators scheduled for the day shift. On another weekly schedule, there were three days without a PBX operator scheduled for any shift. On the third schedule, there were two PBX operators scheduled for eight-hour day shifts on three days with different starting times. This schedule also reflected one day without a day-shift operator where the night shift began at 5 p.m. until 1:30 a.m. instead of 3:00 p.m. until 11:30 p.m.

and (3) whether the employee holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994). See *Oakwood Health Care, Inc.*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006); and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006). The burden of proving supervisory status lies with the party asserting that such status exists. *Oakwood Health Care, Inc.*, supra, slip op. at 9; *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital - Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997). Supervisory status must be established by a preponderance of the evidence. *Oakwood Health Care, Inc.*, supra, slip op. at 9. Lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003); *Michigan Masonic Home*, 332 NLRB 1409 (2000). "[W]henver the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, supra, slip op. at 5; *Avante at Wilson*, 348 NLRB No. 71, slip op. at 2-3 (2006); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991).

The Board insists upon evidence sufficient to establish a finding of actual statutory authority. Job descriptions are only paper authority and are not given any controlling weight by the Board. *Avante at Wilson*, supra, slip op. at 2-3; *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). Supervisory status cannot be established solely by secondary indicia, such as the perception of supervisory status, attendance at meetings, or participation in training classes. While the Board has examined secondary factors not set forth in Section 2(11) of the

Act, these factors, in the absence of statutory indicia, are insufficient to establish supervisory status. *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

The Housekeeping Supervisors

The Employer contends that the housekeeping supervisors have authority within the meaning of Section 2(11) of the Act to assign work, to direct employees, to discipline and effectively recommend discipline, to evaluate employees, and to adjust grievances. The Employer does not contend nor does the record reflect that housekeeping supervisors have the authority to hire, fire, transfer, lay off, recall, or promote employees. As discussed below, I conclude that the record evidence does not establish that the housekeeping supervisors exercise any statutory authority. While the Employer emphasizes the written job description and the perceived supervisory status of the housekeeping supervisors, these secondary factors are not dispositive without sufficient evidence of the primary indicia enumerated in Section 2(11) of the Act. Here, the housekeeping supervisors are hourly employees who utilize a time-clock and are eligible for overtime pay; they receive the same benefits as employees in the petitioned-for unit and are not eligible for bonus or profit-sharing available to the Employer's undisputed supervisors. They spend the vast majority of their time functioning in a quality control capacity. Thus, at best, they are minor lead persons whom the Employer has not vested with "genuine management prerogatives" and who lack true supervisory authority. *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992) (citing *S. Rep. No. 105, 80th Cong.*, 1 Sess. 4 (1947)).

Assignment of Work

The housekeeping supervisors' role in assigning work does not demonstrate statutory supervisory status. The Board's recent decisions in *Oakwood* and *Golden Crest Healthcare Center* provide the framework for determining whether the housekeeping supervisors assign work to housekeeping team members using the requisite degree of independent judgment. In *Oakwood*, the Board explained that assignment means designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or

overtime period), or giving significant overall duties as opposed to discrete tasks. *Oakwood Health Care, Inc.*, 348 NLRB No. 37, slip op. at 4 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006).

However, the authority to make an assignment, by itself, does not confer supervisory status. To establish supervisory authority, the putative supervisor must also use independent judgment when making such assignments. This means that the individual must exercise authority that is free from the control of others, and make a judgment that requires forming an opinion or evaluation by discerning and comparing data. The touchstone is the degree of discretion exercised by the purported supervisor, not whether the discretion involves technical or professional judgment. In *Oakwood*, the Board recognized the spectrum between situations involving little discretion where there are detailed instructions for the actor to follow from situations where the actor is wholly free from constraints. While judgment is not independent if it is dictated or controlled by detailed instructions, it is independent where the policy allows for discretionary choices. Additionally, the judgment must “rise above the merely routine or clerical” for it to be truly supervisory, even if it is made free of control of others and involves forming an opinion by discerning and comparing data. *Id.*, slip op. at 8-9.

Applying this framework, it is first necessary to consider whether the housekeeping supervisors make assignments, then if so, whether they use independent judgment in making the assignments. As discussed below, I conclude that to the limited extent that housekeeping supervisors make assignments, these assignments do not require the degree of independent judgment required by Section 2(11) of the Act to support a finding of supervisory status.

Housekeeping supervisors do not normally assign the housekeeping team members to a particular place, location, or department. The director of housekeeping, not the housekeeping supervisors, prepares the weekly schedule for housekeeping team members and assigns employees to particular locations according to their classification. The director of housekeeping also provides room attendants with their section assignments. However, housekeeping

supervisors also provide room attendants with section assignments on days when the director of housekeeping is not working, approximately two days a week. These section assignments do not require significant discretion as there is little difference between the rooms in one section and those in another, and section assignments are routinely made in accordance with the room attendants stated preferences. Thus, any decision-making in this regard does not rise above the routine or clerical.

While there is some evidence that housekeeping supervisors have authority to move employees between classifications, thereby potentially impacting an employee's work location, the record lacks evidence that the exercise of this authority requires independent judgment sufficient to confer supervisory status. One housekeeping supervisor testified that he had never reassigned an employee. The other housekeeping supervisor testified that he had transferred employees in accordance with instructions received from the director of housekeeping, and that his authority was limited to these situations. Thus, the record evidence does not clearly establish that any housekeeping supervisor exercised independent judgment in reassigning or transferring housekeeping team members. Moreover, even assuming that housekeeping supervisors occasionally reassign employees based on their own discretion, there is no evidence that the reassignment of housekeeping employees involves any individualized assessments of employees' skill sets and weighing of these skills against the Employer's particular needs. To the contrary, the record suggests that any transfers are based upon common sense efficiencies and routine job priorities set by the Employer. In *Oakwood*, the Board cited the charge nurse's assignment of a nurse to a patient as an example of independent judgment in the health care context where the charge nurse weighs the individualized condition and needs of a patient against the skill or special training of available nursing personnel. *Oakwood Health Care, Inc.*, 348 NLRB No. 37, slip op. at 8, 13 (2006). The Board observed that the discretion exercised in "matching a nurse with a patient may have life and death consequences." *Id.*, slip op. at 10-11. This example underscores the absence of

meaningful discretion on the record facts of this case. Moreover, decisions made on the basis of well-known and limited skills and are simply a routine matching of skills to requirements and do not require meaningful discretion. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002); *Clark Machine Corp.*, 308 NLRB 555, 555-556 (1992); *St. Vincent Hospital*, 344 NLRB No. 71, slip. op at 15-17 (2005).

In addition, housekeeping supervisors do not exercise independent judgment in their limited role of making changes to housekeeping employees' work schedules. As previously noted, the director of housekeeping, not the housekeeping supervisors, prepares the weekly schedule for housekeeping team members, which is subject to review by higher management, and housekeeping supervisors do not prepare the schedule when the director of housekeeping is on vacation. While housekeeping supervisors make written notations upon the weekly schedule reflecting scheduling changes resulting from employees' switching shifts or absences, these notations are not evidence of supervisory authority, since there is insufficient evidence that they approve or disprove of these changes. The Employer routinely allows housekeeping employees to switch shifts, and the housekeeping supervisors merely memorialize these scheduling changes on the posted schedule. Additionally, the director of housekeeping, not the housekeeping supervisors, determines whether an employee absence or tardy is excused or unexcused. If an employee calls in sick or is tardy when the director housekeeping is not working or is unavailable, the housekeeping supervisors fill out an absent/tardy notice form which is then submitted to the director housekeeping. However, the record lacks evidence of discipline resulting from these forms being prepared. Accordingly, I find that the housekeeping supervisors' authority to authorize scheduling changes does not require the use of independent judgment where the authority is exercised in accordance with the Employer's policies and procedures and the decisions are of a clerical nature. *Training School at Vineland*, 332 NLRB 1412, 1417 (2007) (adjusting scheduling based on employee requests does not require independent judgment).

Similarly, the record lacks evidence that the housekeeping supervisors utilize independent judgment to authorize overtime. The housekeeping supervisors testified that they do not have authority to authorize overtime on their own but that they approve overtime only in limited situations in accordance with instructions received from the director of housekeeping. Pursuant to these instructions, the housekeeping supervisors can authorize overtime for room attendants when the hotel is fully booked and the room attendant is halfway through the cleaning process at the end of a scheduled shift. In such circumstances the Employer needs the room to be available for lodging and expects the room attendants to work the limited amount of overtime necessary to finish cleaning the room before leaving. This limited authority is not evidence of supervisory status because the housekeeping supervisor's discretion is circumscribed by the Employer's detailed instructions and therefore does not require independent judgment.¹⁴

Likewise, the record does not establish supervisory authority based upon the housekeeping supervisors authority to call-in additional room attendants when the actual occupancy rate is higher than the projected rate in accordance with the Employer's productivity policy. A housekeeping supervisor testified that this happened on five or six occasions in 2007. On such occasions, the housekeeping supervisors are required to contact room attendants who worked the fewest hours and direct them to come to work. Thus, it is evident that the housekeeping supervisors do not exercise independent judgment when calling in additional room attendants where such authority is circumscribed by established policy or higher authority. See *Dynamic Science, Inc.*, 334 NLRB 391 (2001). Moreover, it appears this limited authority has been restricted further. In an attempt to minimize payroll costs and improve productivity

¹⁴ In its brief, the Employer parses the evidence to support its argument that housekeeping supervisors authorize overtime on their own authority. The Employer cites testimony where one of the housekeeping supervisors responded affirmatively when asked whether he could authorize overtime without obtaining prior permission. However, the Employer fails to acknowledge the same housekeeping supervisor's testimony that his ability to approve overtime without prior approval is limited by the Employer's instructions.

rates, the director of housekeeping has recently instructed the housekeeping supervisors not to solicit additional room attendants unless the hotel is fully booked.

Finally, I conclude that record does not establish that housekeeping supervisors assign significant overall duties to any of the housekeeping team members, including the room attendants. As set forth previously, the team members' duties are function of their classification and are performed without significant instruction or oversight. Moreover, to the extent that housekeeping supervisors occasionally assign duties to the room attendants, they do so without independent judgment, thus, their authority is not indicative of supervisory authority. *Oakwood Health Care, Inc.*, 348 NLRB No. 37, slip op. at 8-9 (2006); *McGraw-Hill Broadcasting Co.*, 329 NLRB 454, 456 (1999). In this regard, the room attendants' duties are routine and well-known, and the record evidence does not establish that their respective skills differ significantly or that, in making assignments, it is necessary for the housekeeping supervisors to consider the relative skills or strengths of the employees trained on a particular task. This lack of specific evidence is construed against the Employer. *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 5 (2006); *Avante at Wilson*, 348 NLRB No. 71, slip op. at 2-3 (2006); *Michigan Masonic Home*, 332 NLRB 1409 (2000). In sum, I find that housekeeping supervisors do not assign work using independent judgment and that the Employer's policies and procedures limit the judgment to such a degree that it falls short of that required for supervisory status.

Responsible Direction

The housekeeping supervisors do not use independent judgment to responsibly direct the work of the housekeeping team members. In *Oakwood*, the Board explained that direction means the putative supervisor has employees working "under" him and the authority to instruct those employees on what work needs to be done and who will do it. *Oakwood Health Care, Inc.*, supra, slip op. at 7. Such direction is not supervisory, however, unless it is also done "responsibly," i.e., if the putative supervisor is held accountable for the performance of other employees. *Id.* To establish accountability, the party asserting supervisory status has to show

both that the putative supervisor has “the authority to take correction action” and can potentially receive “adverse consequences” for the performance errors of other employees. *Id.*, slip op. at 7, 10. For the adverse consequences to establish “responsible direction,” the consequences must flow from the other employees’ performance failures, not from the purported supervisor’s own performance failure. Finally, the purported supervisor must also exercise independent judgment in responsibly directing the work of the employees under him.

Here, the evidence fails to establish that the housekeeping supervisors’ direction of team members is either responsible or requires independent judgment. With respect to responsibility, there is no evidence of accountability. While the Employer’s brief alleges that the housekeeping supervisors are subject to discipline if their subordinates do not perform their assigned tasks properly, the Employer does not cite record evidence to support this assertion. In this regard, I note the absence of any testimonial or documentary evidence that housekeeping supervisors have been held accountable for the performance errors of the housekeeping team members. Accordingly, the Employer has not met its burden of showing that the housekeeping supervisors “responsibly direct” where there is no “prospect of adverse consequences for the putative supervisor[.]” Of particular import, I note that the Employer’s annual performance review of housekeeping supervisors did not evaluate them based upon the performance of team members. Accordingly, the Employer has not established that the housekeeping supervisors possess supervisory authority to responsibly direct employees.

The Employer has also failed to establish that housekeeping supervisors regularly have occasion to direct the work of the room attendants. While the record includes an incident where a housekeeping supervisor instructed a room attendant on the proper way to spray room deodorizer, this is not sufficient to confer supervisory status. In addition to the limited exercise of this authority, the room attendants’ cleaning duties are well-known to them and performed outside the presence of the housekeeping supervisors. Moreover, the room attendants are not present during the housekeeping supervisors’ inspections of the guest rooms, and the

housekeeping supervisors routinely correct any deficiencies noted during an inspection on their own without contacting the room attendant. Thus, the record fails to establish that the housekeeping supervisors generally have occasion to direct room attendants.¹⁵

Even if the housekeeping supervisors' inspection of guest rooms can be considered direction of the room attendants as contemplated by *Oakwood*, their inspection duties are circumscribed by the Employer's established policies and therefore do not require the exercise of independent judgment by the housekeeping supervisor. The Employer provides the housekeeping supervisors with detailed criteria for inspecting the guest rooms cleaned by the room attendants. The Employer's inspection form identifies approximately 62 items with corresponding numerical values totaling 100 points. The housekeeping supervisors deduct points for deficiencies; for example, the failure to place fresh soap on a clean soap dish merits a 1 point deduction. However, housekeeping supervisors do not regularly complete the inspection form; thus, the Employer has instructed them to commence doing so more frequently. Moreover, the record does not establish that these forms have historically been used to discipline employees or initiate the disciplinary process. The mere ability to point out tasks that the employees have not performed properly in accordance with the Employer's criteria, to make sure the employees perform their duties, and to call their attention to a particular task that has not been performed properly, does not require independent judgment. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001); *Evangeline of Natchitoches, Inc.*, 323 NLRB 223, 223-224 (1997). As noted earlier, the tasks performed by the room attendants are

¹⁵ Moreover, the record did not clearly establish the extent of direction provided to other housekeeping classifications by the housekeeping supervisors. For example, one of the housekeeping supervisors who testified at the hearing responded affirmatively when asked whether laundry staff followed his instructions. However, there is not sufficient testimony regarding the circumstances, frequency, or types of instructions; therefore, this testimony lacks specificity and is not compelling evidence that the housekeeping supervisors direct the work of the housekeeping staff on a regular or meaningful basis. Nor is such direction established by evidence that housekeeping supervisors can instruct house attendants to deliver sheets and pillows. This is not particularly instructive if the house attendants routinely comply with similar requests from the room attendants and other co-workers, which appears likely given that the house attendants are responsible for supplying the room attendants. In any event, the Employer has failed to establish that any direction is done responsibly or requires independent judgment.

limited, repetitive, and well-known to the employees, thereby reducing the degree of independent judgment in directing such tasks. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002); *Beverly Health and Rehabilitation Services, Inc.*, *supra*. Accordingly, I conclude that any judgment used by the housekeeping supervisors to direct the room attendants employees is curtailed by the Employer's established policies and procedures, and the tasks are of such a routine and repetitive nature, that the degree of judgment used to direct such tasks falls short of the independent judgment required for supervisory status. *Oakwood Care Center*, 348 NLRB No. 37, slip op. 7, 10 (2006); *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

Discipline/Effective Recommendation of Discipline

The housekeeping supervisors do not possess supervisory authority to discipline employees or otherwise exercise disciplinary authority that leads to personnel actions without the independent investigation or review by higher management personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Children's Farm Home*, 324 NLRB 61 (1997). The record does not contain any documentary evidence of discipline either issued by housekeeping supervisors or resulting from their recommendation. While the Employer's general manager testified that housekeeping supervisors have authority to effectively recommend discipline, he could not testify to a specific instance of discipline resulting from the effective recommendation of a housekeeping supervisor. Accordingly, I do not accord any weight to his conclusionary testimony. *Avante at Wilson*, 348 NLRB No. 71, slip op. at 2-3 (2006).

The testimony from the director of housekeeping also fails to establish supervisory authority. She testified that housekeeping supervisors provide "a lot of input" on the level of discipline warranted by a particular situation and that she made a joint decision with housekeeping supervisors regarding the level of discipline. However, she failed to identify a specific incident or otherwise provide any documentary evidence in support of her assertions and the housekeeping supervisors disputed this testimony. Moreover, the director of

housekeeping admittedly testified that she would not issue discipline based upon a housekeeping supervisor's account of an incident without first talking with the employee involved to obtain his or her perspective. Thus, it is apparent she investigates potential disciplinary situations independent of or in addition to the housekeeping supervisors' input. Where the record is inconclusive, supervisory status is not established, and the lack of specific evidence is construed against the Employer.¹⁶ *Michigan Masonic Homes*, 332 NLRB 1409 (2000).

The Employer also relies heavily upon testimony of housekeeping supervisors who responded affirmatively when asked whether the director of housekeeping had asked them to become more involved in discipline. However, their subsequent testimony clarified that they construed the question to refer to oral counseling or advising an employee of performance deficiency, and that the director of housekeeping encouraged them to increase their use of Employer's inspection form to point out performance deficiencies. Thus, no one testified that these oral counselings constituted discipline or a recommendation of discipline. In addition, I note that the director of housekeeping did not testify that housekeeping supervisors could issue discipline on their own authority, but she did testify that she would conduct an investigation rather than simply rely upon a housekeeping supervisor's report of misconduct. Where the record evidence is inconclusive, the Employer has not met its burden of proof. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Thus, I am unable to conclude that housekeeping supervisors participate in the Employer's disciplinary process to a degree that confers supervisory status.

¹⁶ In its brief, the Employer cites testimony regarding an incident where a housekeeping supervisor asked the director of housekeeping to talk to an employee who regularly failed to show up for her scheduled shift. This testimony, standing alone, does not evidence the authority to effectively recommend discipline. The housekeeping supervisor could not recall whether or not he told the director that he felt the employee should receive written discipline, and he did not know whether the employee had received any discipline. Moreover, the Employer did not introduce any documentary evidence that this incident resulted in discipline.

Evaluation/Reward

The housekeeping supervisors' participation in the evaluation process does not confer supervisory status. Section 2(11) does not include "evaluation" in its enumeration of supervisory functions. When an evaluation does not, by itself, affect the wages or job status of the employee being evaluated, the individual performing the evaluation, without more, is not a statutory supervisor. *Children's Farm Home*, 324 NLRB 61 (1997). Here, the Employer has failed to establish that the annual evaluation of employees impacts employees' wages or job status. In any event, the director of housekeeping, not the supervisors, prepares probationary and annual evaluations. Housekeeping supervisors do not complete any portion of the evaluation, nor are they necessarily present when the director of housekeeping prepares the evaluation. While the director of housekeeping may rely upon generalized information obtained from day-to-day conversations with the housekeeping supervisors, they do not make any formal recommendation. Thus, their participation is considerably less than that required for supervisory status.¹⁷ Supervisory status is not established where an individual simply presents an employee with an evaluation prepared and completed by someone else. Accordingly, the Employer has failed to establish that the annual evaluation leads to an increase in wages or job status or that the housekeeping supervisors' role in the evaluation process involves the exercise of statutory authority.

Adjustment of Grievances

The housekeeping supervisors do not possess authority to resolve employee grievances or effectively recommend the adjustment of grievances within the meaning of Section 2(11) of the Act. While the housekeeping team members discuss work-related complaints with the

¹⁷ See *Bayou Manor Health Center*, 311 NLRB 955 (1993) (direct correlation between the evaluations completed by LPNs and the specific merit increases awarded without further review of the evaluations' numerical scores); *Trevila of Golden Valley*, 330 NLRB 1377 (2000) (supervisory status where LPN completed annual evaluation and presented evaluation to employee without any review or prior approval from higher authority); *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995) (supervisory status where evaluator played primary role in evaluation process and no evidence that reviewer ever changed a rating or retained ultimate authority over evaluation).

housekeeping supervisors, the authority to handle routine or ministerial complaints is a clerical function that does not demonstrate supervisory status. *Quadrex Environmental Co.*, 308 NLRB 101 (1992.) To the extent that housekeeping supervisors address minor disputes among team members, this limited authority is not sufficient to confer supervisory status. *Ken-Crest Services*, 335 NLRB 777 (2001) (program managers' authority to adjust minor grievances and personality conflicts among employees does not establish supervisory status); *St. Francis Medical Center-West*, 323 NLRB 1046 (1997) (limited authority to resolve minor squabbles between employees is not evidence of statutory authority to resolve grievances); *Dico Tire, Inc.*, 330 NLRB 1252 (2000) (evidence that employees submitted complaints about working conditions to individual who also scheduled overtime, vacations, and absences, insufficient to establish supervisory status). While the housekeeping supervisors convey employee complaints regarding scheduling or the Employer's productivity policy to upper management, there is no evidence they possess authority to resolve these complaints and their role as a conduit does not establish supervisory status. *Ken Crest, supra*; See also *John Cuneo of Oklahoma*, 238 NLRB 1438, 1439 (1979). Thus, the Employer has failed to support its claim that the housekeeping supervisors adjust grievances with the meaning of Section 2(11) of the Act.

The Front Office Supervisor

The Employer contends that the front office supervisor has statutory authority to assign; to direct; to discipline; to hire; and to evaluate employees; and managerial authority to conduct audits. I conclude that the front officer supervisor has authority to assign work within the meaning of Section 2(11) of the Act. Based on this conclusion, it is unnecessary to determine whether the front office supervisor also possesses other supervisory indicia. Nonetheless, as discussed briefly below, I find that the front office supervisor lacks other statutory authority or managerial authority.

Assignment of Work

The record establishes that the front office supervisor assigns work using independent judgment as required by the *Oakwood* analysis set forth above. Unlike the housekeeping supervisors, the front office supervisor prepares the weekly schedule for the front office employees. While she submits the schedule to the director of room operations as matter of procedure, there is no evidence that he alters the schedules or provides her with instructions. In addition, there is no contention that her scheduling decisions are constrained by any policy or productivity ratio. As evidenced by the schedules introduced at hearing, the front desk office supervisor can schedule additional shifts as she deems necessary to handle the number of arrivals and departures for a particular day, to vary the number of guest service agents and PBX operators assigned per shift, and to designate the starting times of the particular shifts. Further, she reviews requests for time-off and vacation with the director of room operations and the record suggests that he routinely follows her recommendations on whether to approve or deny such requests without conducting further investigation. The record also establishes that the front office supervisor asks employees to work overtime as she deems necessary and there is no evidence that her decision is based on any criteria or policy established by the Employer. While the front office supervisor testified that she would not require employees to work overtime, she does not obtain permission from the director of room operations prior to soliciting volunteers. Thus, unlike the housekeeping supervisors, her authority to solicit overtime is not undertaken in accordance with the Employer's instructions. On these facts, I conclude that the record establishes that the front office supervisor has supervisory authority to assign work using independent judgment. *Oakwood Health Care, Inc.*, 348 NLRB No. 37, slip op. at 7-9 (2006).

Other Statutory Indicia

However, the front office supervisor does not responsibility direct the work of the front office employees. There is no evidence that she is held accountable for the performance of other employees or that she exercises independent judgment in directing the work of the

employees. Similarly, there is insufficient evidence to establish that front office supervisor has authority to hire or recommend employees for hire. The Employer relies upon testimony from the director of room operations to support its claim of hiring authority. The director testified that the front office supervisor interviewed candidates for hire and that her recommendation could eliminate a candidate from further consideration on the basis of the interview. However, this testimony was refuted by the front office supervisor herself, who testified that she had never interviewed an applicant on her own or otherwise participated in the interview of an applicant. Thus, the record evidence is contradictory and inconclusive, and the Employer has not met its burden of proof. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Further, the front office supervisor's review of applications with the director of room operations alone does not establish statutory authority. The mere participation in the hiring process, particularly where higher management participates in the process, absent the authority to effectively recommend hire, is an insufficient basis to establish supervisory authority. *Training School at Vineland*, 332 NLRB 1412, 1417 (2000).

The record lacks sufficient evidence to establish that the front office supervisor has authority to discipline or effectively recommend discipline. The director of room operations testified that the front office supervisor can issue written disciplinary warnings without prior approval. His testimony, however, was not corroborated by either the front office supervisor herself who testified that she was not involved in written warnings or any documentation supplied by the Employer. While the record reflected one instance where the Employer conducted an investigation based upon allegations reported by the front office supervisor to the director of room operations, the mere exercise of reporting function does not make one a statutory supervisor. In this one instance, the Employer conducted an independent investigation, which included auditing the employee's bank, and ultimately terminated the employee based upon the results of its audits and investigation. Even though the front office supervisor testified that she informed the director of room operations that she would quit if the

Employer did not terminate the employee in question, this “him or me” statement is not evidence of the authority to effectively recommend discipline since the director of operations testified that the Employer would not have terminated the employee if the audit had not disclosed cash shortages in the employee’s drawer. Effective recommendation means the recommended action is taken without any independent investigation by superiors, not simply that recommendation is ultimately followed.¹⁸ *Lincoln Park Nursing Home*, 318 NLRB 1160, 1163 (1995); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *Training School at Vineland*, 332 NLRB 1412, 1417 (2000).

The front office supervisor does not have statutory authority to evaluate employees. Although the evidence establishes that front office supervisor directly assists the director of room operations in the preparation of the evaluation, it did not establish that the annual evaluation results in any personnel action. When an evaluation does not, by itself, affect the wages or job status of the employee being evaluated, the individual performing the evaluation is not a statutory supervisor. *Croft Metals*, 348 NLRB No. 38, Slip. op. at 4 (2006); *Children’s Farm Home*, 324 NLRB 61 (1997). “[A]uthority simply to evaluate employees without more is insufficient to find supervisor status.” *Quadrex Environmental Co.*, 308 NLRB 101 (1992), citing *Passavant Heath Center*, 284 NLRB 887, 891 (1987).

Managerial Authority

Although the Act does not specifically address managerial employees, the Board has traditionally excluded these employees from the protection of the Act. *Ford Motor Co.*, 66 NLRB 1317, 1322 (1946). The purpose of exempting managerial employees is to ensure “that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union.” *NLRB v. Yeshiva University*, 444 U.S. 672, 687-688

¹⁸ The front office supervisor also testified that she told the director of room operations that she felt an employee with chronic attendance problems should be written up or terminated. While the employee was ultimately terminated, the front office supervisor did not know whether the director of room operations conducted an investigation and the director of room operations did not testify regarding this incident. This is not sufficient to establish Section 2(11) supervisory authority

(1980). The party asserting managerial status bears the burden of proof on this issue, and the specific job title of the employee is not controlling. *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003). Whether or not an employee is “managerial” is determined by the employee's actual job responsibilities, authority, and relationship to management. *NLRB v. Bell Aerospace Co Div. of Textron, Inc.*, 416 U.S. 267, 290 (1974). The Board defines “managerial employees” as those who formulate and effectuate management policies by expressing and making operative the decisions of their employers, and those who have discretion in the performance of their jobs independent of their employer's established policy. *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). Managerial authority does not exist where the employee's actions must conform to the employer's established policy. *Eastern Camera and Photo Corp.*, 140 NLRB 569, 571 (1963). Thus, the fact that the Employer may view the front office supervisor as a manager is immaterial to the Board's determination.

Here, there is no evidence that the front office supervisor plays any role in formulating or effectuating the Employer's policy or that she exercises discretion when conducting an audit. The Employer avers that she is a manager by the fact that she conducts an audit. I find no authority on which to conclude that an individual is a managerial employee solely on this basis.

CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of the Act.
4. The Petitioner claims to represent certain employees of the Employer.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time housekeeping employees, laundry employees, maintenance employees, customer service employees, front desk employees, gift shop employees, janitorial employees, food and beverage employees, valet employees, office staff employees, housekeeping supervisors, purchasing manager, accounts payable employees, accounts receivable employees, catering administrative assistants, kitchen supervisors, and night auditors, employed by the Employer at its Modesto, facility, EXCLUDING sous chefs, lead banquet captain, banquet captains, bell captain, income auditor, sales and catering managers, executive administrator, front office supervisor, guards, and supervisors as defined in the Act.

There are approximately 180 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Teamsters Local 948, International Brotherhood of Teamsters**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as

their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in Region 32, 130 Clay Street, Room 300N, Oakland, California, 94612-5211, on or before **March 20, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website,

www.nlr.gov¹⁹, by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of the list will continue to be placed upon the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact Region 32.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the 12.01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 27, 2008**. The request

¹⁹ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web sit, www.nlr.gov.

may be filed electronically through the Agency's website, www.nlr.gov²⁰, but may not be filed by facsimile.

Dated: March 13, 2008

/s/ Alan B. Reichard
Alan B. Reichard, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

²⁰ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web sit, www.nlr.gov.